Supreme Court, U.S.
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No. 91-827

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FARMERS GROUP, INC., et al.,
Petitioners,
vs.
AMERICAN ASSOCIATION OF RETIRED PERSONS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This Court in *P.E.R.S. v. Betts*, 492 U.S. 158 (1989) and in *United Air Lines v. McMann*, 434 U.S. 192 (1977) held that a discriminatory employee benefit plan provision that preexisted the passage of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. Sections 621, *et seq.*, did not violate the ADEA. The Court of Appeals for the Ninth Circuit found that a provision of the Farmers Group, Inc. Profit Sharing Plan preexisted the passage of the ADEA and was not materially modified after the passage of the ADEA. Yet, the Court of Appeals ruled that the provision of the Profit Sharing Plan was not exempt under Section 4(f)(2) of the ADEA, as interpreted under *Betts* and *McMann*. The Court of Appeals also held that the Profit Sharing Plan was partly wages and not a fringe benefit even though both plaintiffs and defendants agreed that the Plan is an employee benefit plan as defined by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* Thus, the questions presented for review are:

1. Did the Court of Appeals misapply the *Betts* and *McMann* holdings to Farmers' Profit Sharing Plan?

2. Is a defined contribution plan that is subject to ERISA a fringe benefit plan within the scope of Section 4(f)(2) of the ADEA?

3. In construing Section 4(f)(2) of the ADEA, may a court rely upon changes or modifications to a different, separately funded and administered employee benefit plan to conclude that the plan under attack violates the ADEA?

4. Did the Court of Appeals misapply the holding of *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) in concluding that Farmers' Group, Inc., *et al.*, were willful in their violation even though the law was unclear and Farmers filed two lawsuits to determine the status of the law?

PARTIES TO THE ACTION

The Petitioners are the following: Farmers Group, Inc., Farmers New World Life Insurance Co., The Ohio State Life Insurance Co., Investors Guaranty Life Insurance Co., Farmers Insurance Exchange, Truck Underwriters Association, Truck Insurance Exchange, Fire Underwriters Association, Fire Insurance Exchange, Farmers Group, Inc., Employees' Pension Plan, and Farmers Group, Inc. Employees' Profit-Sharing Savings Plan Trust.

The Respondents include the American Association of Retired Persons, six original plaintiffs, and an additional 24 persons who filed consents to become plaintiffs. A complete listing follows:

American Association of Retired Persons

Mildred Abramson	Vesta Agnew
Howard D. Bellows	Ronald E. Blair
Carolyn J. Blume	Florence B. Bodi
Annabelle M. Chapman	Frances L. Churchill
Carol Clubb	Roy N. Eichelberger
Eva L. Gaskill	Ethel Giventer
Virginia D. Gould	Margaret J. Jashni
Thelma Lamoreaux	Marigo K. Merrick
Herbert L. Miller	Howard E. Moore
Richard S. Moore	Charles M. Morris
Rose M. Parr	Harold Punches
Pattison Sprague	Germaine Stiles
Carol V. Sullivan	Theodore Undesser
Duane D. VanGuilder	Dorothy M. Wagner
Letitia R. Wallace	Warren Z. Walter

RULE 29.1 STATEMENT

Farmers Group, Inc. is a wholly owned subsidiary of B.A.T. Industries. B.A.T. Industries is a corporation organized in the United Kingdom. Farmers New World Life Insurance Co., The Ohio State Life Insurance Co., Truck Underwriters Association, and Fire Underwriters Association are wholly owned subsidiaries of Farmers Group, Inc. The other Petitioners have no parent or subsidiary company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW. i

PARTIES TO THE ACTION ii

RULE 29.1 STATEMENT. iii

TABLE OF AUTHORITIES. vi

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

A. The Court Of Appeals Conclusion That The Profit Sharing Plan Is Partly "Wages" Conflicts With The *Betts* Decision And Has Serious Tax And ERISA Consequences For Other Plans 7

1. The Court of Appeals Decision Conflicts with *Betts* 7

2. The Court of Appeals Decision Potentially Creates Tax and ERISA Problems. 9

Page

B. The Court Of Appeals Decision Conflicts With The Safe Harbor Created By *Betts* And *McMann* 12

C. The Court Of Appeals Decision Also Conflicts With This Court's Decision On Willfulness 14

CONCLUSION 18

APPENDIX A
Opinion of the Court of Appeals for the Ninth Circuit, Rendered August 20, 1991 . . A1

APPENDIX B
Final Judgment of Central District Court, Entered June 5, 1990 . . . . . B1

APPENDIX C
Amended Statement of Facts and Conclusions of Law, Filed June 18, 1990 . . . . . C1

TABLE OF AUTHORITIES

Page

Cases

Nabob Oil Co. v. United States
190 F.2d 478 (10th Cir.), *cert. denied*,
342 U.S. 876 (1951) 14

P.E.R.S. v. Betts
492 U.S. 158 (1989) 5, 7-9, 12, 13, 16

Trans World Airlines, Inc. v. Thurston
469 U.S. 111 (1985) 8, 14, 17

United Air Lines v. McMann
434 U.S. 192 (1977) 12-14

Statutes

26 U.S.C. § 401(a) 10
26 U.S.C. § 401(a)(7). 11
26 U.S.C. § 402(b) 10, 11
26 U.S.C. § 411(a)(1). 11
26 U.S.C. § 415(c)(3). 10
26 U.S.C. § 501 . . . . . .10, 11
26 U.S.C. § 3121(a)(5) 10
26 U.S.C. § 3401(a)(12) 10
28 U.S.C. § 1254(1) 2
29 U.S.C. § 623(f)(2). 2
29 U.S.C. § 626(c)(1). 2
29 U.S.C. § 1002(2) 9
29 U.S.C. § 1002(34). 14
29 U.S.C. § 1002(35). 14
29 U.S.C. § 1053(a)(1) 11
29 U.S.C. § 1132(d)(1) 14
29 U.S.C. § 1132 (d)(2). 14
29 U.S.C. § 1132(e)(1) 2

Page

Omnibus Reconciliation Act of 1986
(Public Law 99-509) 16

Regulations and Rulings

26 CFR § 1.401-1(b)(1)(ii) 9, 10
26 CFR § 1.415-2(d)(11) 10
26 CFR § 1.451-2. 11
29 CFR § 1604.9(a). 8
29 CFR § 2510.3-1(b)(2) 10
29 CFR § 2510.3-2(c) 10

Rev. Rul. 68-24, 1968-1 C.B. 150 9
Rev. Rul. 81-210, 1981-2 C.B. 89 16

Other Authorities

ABA Section of Labor and Employment Law,
Employee Benefits Law, 938 (1991) 16

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FARMERS GROUP, INC., et al.,
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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, rendered on August 20, 1991, is attached as Appendix A. The Judgment of the District Court, entered on June 5, 1990, is attached as Appendix B. The District Court for the Central District of California entered an Amended Statement of Facts and Conclusions of Law on June 18, 1990, and a copy is also attached as Appendix C.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered on August 20, 1991. This Petition for a Writ of Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

The District Court had jurisdiction under 29 U.S.C. Section 626(c)(1), and 29 U.S.C. Section 1132(e)(1).

STATUTORY PROVISION INVOLVED

The primary statutory provision involved in this petition is Section 4(f)(2) of the ADEA, which provided in relevant part that:

> "It shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter. . . ." 29 U.S.C. Section 623(f)(2).

STATEMENT OF THE CASE

Six plaintiffs filed this action on September 23, 1986, against Petitioners Farmers Group, Inc., *et al.*, invoking jurisdiction under the ADEA and ERISA. The Complaint contended that Farmers' Profit Sharing Plan and Farmers' Pension Plan violated the ADEA and ERISA.[1] Prior to the enactment of the ADEA, Farmers and its affiliated companies provided to their employees two qualified employee benefit plans: the Farmers Group, Inc. Employees' Profit Sharing Savings Plan Trust (the "Profit Sharing Plan") and the Farmers Group., Inc., Employees' Pension Plan (the "Pension Plan"). The Profit Sharing Plan was created in 1948 as a defined contribution plan and the Pension Plan was created in 1943 as a defined benefit plan.[2] (CR 107; 108).

The Farmers' Profit Sharing Plan is an employee benefit plan as defined by ERISA. (Complaint ¶ 9; CR 1:4) The Plan states that one of its purposes is to provide an opportunity for accumulation of an account balance for retirement and financial emergencies. (CR 107:356) Farmers allocates company contributions to the Plan for those employees who meet time of service and minimum age requirements. Unlike wages, employees cannot obtain any distribution from the Plan until after five full years of contributions have been made on behalf of the employees. Additionally, the most that

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[1] Petitioners are not seeking to review the decision of the Court of Appeals as to the Pension Plan. This Petition therefore does not address all of the contentions relating to the Pension Plan.

[2] A defined contribution plan is a pension plan which provides for an individual account and for benefits based on the amount contributed to the participant's account. In a defined benefit plan, the benefit is fixed by a formula and the contributions are calculated to achieve that benefit.

employees can obtain annually is 20% of the balance of the Plan, and thus employees will have a balance in the Plan at the time of their normal retirement date.

Section 7.4 of the Profit Sharing Plan provided that a participant who remained on the payroll after normal retirement date should not be credited with contributions or forfeitures. (CR 107:369-70). While as a technical matter Section 7.4 did not exist prior to 1976, the terms of the Profit Sharing Plan from at least 1965 precluded an allocation of contributions and forfeitures for employees who remained employed after the normal retirement age of 65. (CR 107:179-80). As a result of the enactment of ERISA, the Profit Sharing Plan was amended in 1976. Certain sections of the Profit Sharing Plan were renumbered and the language was slightly changed from the prior version to comply with ERISA (CR 107:356). As the Court of Appeals noted, the effect of the 1976 amendment was not different from the earlier provisions of the Plan: under Section 7.4 of the Plan an employee who continued to work after age 65 would not receive contributions or forfeitures.

Farmers Group, Inc. in May 1978 reviewed the impact of the amendments to the ADEA that were to be effective in 1979 and concluded that it did not need to modify the Profit Sharing Plan. (CR 94:379, 383). Outside counsel indicated in June 1978 that the amendments to the ADEA did not require contributions for Farmers' Pension Plan for employees working after the normal retirement date but that the impact on the Profit Sharing Plan was not as clear. The outside attorney cited congressional testimony permitting the cessation of such profit sharing contributions at normal retirement date and concluded that he could not state categorically that the current provision of Farmers' Profit Sharing Plan would violate the ADEA. (CR 94:391-94). In June

1979, Farmers' inside counsel reviewed the new Department of Labor Interpretative Bulletin and concluded that under the Bulletin Farmers could not continue to exclude employees over age 65 from participating in further contributions to the Profit Sharing Plan. The inside counsel suggested that Farmers obtain a legal opinion on this issue. (CR 94:397). Farmers obtained additional outside legal opinion in 1979 on the legality of the Profit Sharing Plan provision. The outside counsel concluded that Farmers' practice of discontinuing contributions was lawful and that the Department of Labor Interpretative Bulletin was wrong. (CR 94:401-413). Farmers thereafter filed two lawsuits to challenge the Interpretative Bulletin but both suits were dismissed without a decision on the merits. This Court in *P.E.R.S. v. Betts*, 492 U.S. 158 (1989) eventually agreed with Farmers' position that the Department of Labor position in the Interpretative Bulletin was inconsistent with the language of the ADEA.

Plaintiffs instituted this lawsuit on September 23, 1986, alleging that the Farmers' Profit Sharing Plan and Farmers' Pension Plan violated the ADEA and ERISA. After discovery, all parties moved for summary judgment on liability. On September 22, 1988, the District Court granted Respondents' Motion for Partial Summary Judgment on liability under the ADEA and ERISA. In May 1990, the District Court granted Respondents' Motion for partial Summary Judgment on the issue of damages and Farmers timely appealed the final Judgment of June 5, 1990.

The Court of Appeals affirmed the District Court's judgment on August 20, 1991, finding that Farmers

violated the ADEA.[3] As to the Profit Sharing Plan, the Court of Appeals found that, while as a technical matter Section 7.4 of the Profit Sharing Plan did not exist prior to 1976, the Profit Sharing Plan did previously contain another section which precluded contributions and forfeitures for employees who worked after age 65, and this earlier provision existed in the Plan from at least 1965. Thus, the Court found that the relevant provisions of the Profit Sharing Plan preexisted the ADEA. Nevertheless, the Court found that the Profit Sharing Plan violated the ADEA for two basic reasons:

(1) The Profit Sharing Plan is partly a form of wages and not an employee benefit plan governed by Section 4(f)(2); and

(2) Changes made to the Pension Plan in 1978 worked a change in the retirement package, thereby affecting the Profit Sharing Plan.

The Court also found that the violation of the ADEA was willful because Farmers allegedly continued with its discriminatory practice without waiting for legal advice on the effect of the 1978 amendments to the ADEA.

On October 25, 1991, the Court of Appeals issued a stay order, staying issuance of the mandate for 30 days, pending disposition by this Court.

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[3] The Court of Appeals did not decide whether Farmers violated ERISA even though Farmers had appealed the District Court's finding of an ERISA violation. The ERISA issues are therefore not raised in this Petition. If this Court determines that the ADEA violations should be overturned, then the case should be remanded to the Court of Appeals for the ERISA issues.

REASONS FOR GRANTING THE WRIT

A. The Court Of Appeals Conclusion That The Profit Sharing Plan Is Partly "Wages" Conflicts With The *Betts* Decision And Has Serious Tax And ERISA Consequences For Other Plans.

1. The Court of Appeals Decision Conflicts with *Betts*.

Section 4(f)(2) of the ADEA makes it lawful to observe the terms of an employee benefit plan that is not a subterfuge to evade the purposes of the Act. The Court of Appeals construed Farmers' Profit Sharing Plan to be partly a retirement plan and partly "wages." Based upon this erroneous classification of the Profit Sharing Plan as partly wages, the Court then concluded that Section 4(f)(2) of the ADEA did not protect the Plan because the Plan was not an employee benefit plan. This conclusion is contrary to this Court's holding in *Betts* and conflicts with the record in this case and with ERISA.

The Court in *Betts* rejected a narrow reading of the term "employee benefit plan." The Court stated:

> "The statute's use of the phrase '*any* employee benefit plan' seems to imply a broad scope for the statutory exemption, and the 'such as' clause suggests enumeration by way of example, not an exclusive listing. Nor is it by any means apparent that the types of plans mentioned were intentionally selected because the cost to the employer of the benefits provided by these plans

> tends to increase with age. Indeed, many plans that fall within these categories do not share that particular attribute at all, defined-contribution pension plans perhaps being the most obvious example." 109 S.Ct. at 2864.

The Court in *Betts* also drew a distinction between fringe benefits, which are subject to protection under Section 4(f)(2), and wages, salaries and other non-fringe benefit terms and conditions of employment. 109 S.Ct. at 2866. The Court in *Betts* set forth the rule that when an employee seeks to challenge a post-ADEA benefit plan provision, the employee bears the burden of proving that the provision was intended to serve the purpose of discriminating in some non-fringe benefit aspect of the relationship. *Id.* at 2868. Thus, if Farmers' Profit Sharing Plan is *a* fringe benefit, it is an employee benefit plan under Section 4(f)(2).

Although a fringe benefit is not defined in the ADEA or its regulations, this Court has stated that interpretations of the substantive provisions of Title VII of the Civil Rights Act of 1964 apply with equal force in interpreting the ADEA. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). A profit-sharing plan has been construed by the Equal Employment Opportunity Commission to be a "fringe benefit" under Title VII. In its regulations on discrimination because of sex, the EEOC specifically provides that fringe benefits are defined to include "profit-sharing and bonus plans." 29 CFR § 1604.9(a).

Farmers' Profit Sharing Plan is a defined contribution plan; it is not a simple profit sharing plan that annually distributes profits to employees. The Plan and its related trust were drafted to be a "qualified" retirement plan and tax-exempt trust under the Internal Revenue Code, which

status was granted by the Internal Revenue Service. In addition, because the Plan was a retirement plan, it was subject to ERISA. As a result, the Plan, its related trust and those persons who have discretionary authority and control over the assets of the Plan are subject to numerous restrictions and requirements under ERISA and the Internal Revenue Code. The application of ERISA and the Internal Revenue Code also meant that the assets of the Plan and the rights of participants to their benefits under the Plan were protected. The fact that the Plan also allowed limited pre-retirement distributions in the event a participant completed five years of service and elected to receive a 20% distribution of his or her account balance does not change the conclusion that the Plan was a qualified and tax-exempt retirement plan and trust subject to ERISA and the Code. 26 CFR § 1.401-1(b)(ii); Rev. Rul. 68-24, 1968-1 C.B. 150; 29 U.S.C. § 1002(2). Thus, the Plan is a fringe benefit, and the holding of the Court of Appeals that the Plan was, in part, "wages" is contrary to this Court's holding in *Betts*.

2. The Court of Appeals Decision Potentially Creates Tax and ERISA Problems.

The Court of Appeals holding that the Plan represents, in part, "wages' not only raises tax and ERISA issues with respect to the Plan, but it potentially creates serious repercussions with respect to any other qualified plan and trust that allows pre-retirement distributions. Such potential results are briefly discussed below.

First, the Court of Appeals decision that pre-retirement distributions from a qualified plan are wages is contrary to and conflicts with the general statutory scheme of what constitutes wages under the Internal

Revenue Code. Code Sections 3121(a)(5) and 3401(a)(12) provide that payments made from a trust qualified under Section 401(a) and exempt from tax under Code Section 501 are not wages for purposes of FICA and income tax withholding. 26 U.S.C. §§ 3121(a)(5); 3401(a)(12). Moreover, other sections of the Code and the Treasury Regulations rely on those statutory definitions of wages for other purposes. *See e.g.*, 26 U.S.C. § 415(c)(3) and 26 CFR § 1.415-2(d)(11). Thus, this wage categorization is contrary to the statutory scheme under the Internal Revenue Code.

Second, the Court of Appeals decision results in splitting the Plan into two plans, a retirement plan and a wage plan. Although a retirement plan is subject to ERISA, a wage plan generally is not subject to ERISA and its many protections. *See* 29 CFR §§ 2510.3-1(b)(2) and 2510.3-2(c). Thus, the court has potentially limited the applicability of ERISA in circumstances where ERISA should apply. If ERISA does not apply, a plan and its related trust are not subject, among other things, to ERISA's participation, vesting and fiduciary duty provisions. Thus, to divide the Plan, or any other plan, into ERISA and non-ERISA components is contrary to ERISA and its purpose to protect participants.

Moreover, a wage plan would not qualify as a profit sharing plan and related trust under the Internal Revenue Code. 26 CFR § 1.401-1(b)(1)(ii). The immediate impact of such a disqualification is that a plan's participants would be taxed on their benefits at the time the contributions are made to the trust, regardless of whether those benefits have been distributed. 26 U.S.C. §§ 401(a), 402(b) and 501.[4]

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[4] Further, the existence of an election to receive benefits or defer them invokes the "constructive receipt doctrine" which provides that

(continued)

This unintended result would be devastating to the participants.

Third, if pre-retirement distributions are considered wages, they must have been wages when originally contributed to the Plan. The character of the contributions cannot change simply by the passage of time. As such, these wages would constitute employee, as opposed to employer, contributions to the Plan. Under ERISA and the Internal Revenue Code, employee contributions are to be 100% vested at all times. *See* ERISA § 203(a)(1), 29 U.S.C. § 1053(a)(1), and 26 U.S.C. § 411(a)(1). However, the provisions of the Plan, like the provisions of other plans, would treat such "wages" as employer contributions subject to a vesting schedule and possible forfeiture if the employee left before vesting. Such provisions would violate both ERISA and the Code. Under the Code, such a violation would cause the Plan to lose its qualified and tax exempt status. 26 U.S.C. §§ 401(a)(7), 411(a)(1) and 501. The result is that participants would be immediately taxed on their account balances. 26 U.S.C. § 402(b).

In summary, the Court of Appeals decision that part of the Plan is "wages" must not be allowed to stand. Each company with a retirement plan that permits pre-retirement distributions will now be concerned with whether the distributions are wages. The decision is inconsistent with the purpose of the Plan itself and with the statutory scheme of ERISA and the Internal Revenue Code. The decision may create tax and ERISA problems for existing plans and participants and may well lead to

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(fn. continued)
a participant will be taxed on his or her benefits, regardless of whether such benefits are distributed or left in a trust and paid out at retirement. 26 CFR § 1.451-2.

fewer companies providing such retirement plans to their employees.

B. The Court Of Appeals Decision Conflicts With The Safe Harbor Created By Betts And McMann.

This Court in *United Air Lines v. McMann*, 434 U.S. 192 (1977) set forth a safe harbor or automatic rule that an employee benefit plan that preexisted the ADEA cannot be a subterfuge to evade the purposes of the ADEA and thus does not violate the ADEA. 434 U.S. at 203. In *Betts*, this Court continued the safe harbor of *McMann* and insulated from challenge the age 60 rule in *Betts* that was adopted before the ADEA was applicable to the defendant. This Court in *Betts* only reviewed the plan provision that was added to the plan after the ADEA because the new provision increased the age-based disparity caused by the pre-ADEA age limitation. *Betts*, 109 S.Ct. at 2861-62.

The Court of Appeals below found that Farmers' Profit Sharing Plan provisions have precluded contributions to employees over age 65 from at least 1965. The Court also found that Section 7.4 of the 1976 Plan continued in effect the pre-ADEA provisions that precluded contributions to those over age 65. Under *McMann* and *Betts*, the Court of Appeals should have concluded that the profit sharing plan provision in question was protected by Section 4(f)(2) of the ADEA.

In order to avoid the logical conclusion that the Profit Sharing Plan was insulated from attack by *McMann* and *Betts*, the Court of Appeals created a new theory for attacking employee benefit plans. The Court of Appeals viewed the Profit Sharing Plan as part of an overall retirement package and held that a discriminatory change

in any portion of the retirement package infected other separately funded and administered plans. Thus, because Farmers changed its Pension Plan in 1978, the Court of Appeals determined that the safe harbor of *McMann* was no longer applicable to the separately administered, separately funded, and separately documented Profit Sharing Plan. Not only was there no factual support for the Court's conclusion, but more importantly, such an approach for reviewing the legality of employee benefit plans is contrary to prevailing authority and would lead to serious problems of plan administration for all employers, not just Petitioners.

The Court of Appeals' new theory for analyzing employee benefit plans is based on the belief that employees considered both the Pension Plan and the Profit Sharing Plan as part of their retirement and that a change in one of the plans would affect the overall value of the retirement package. While the Court of Appeals is correct that a change in one of the two separately funded and administered retirement plans may impact the overall retirement amount available for any employee, this Court rejected such an approach in *Betts*. In *Betts*, this Court specifically found that the age 60 rule, adopted before the ADEA was applicable to the states, was insulated under *McMann* from challenges of subterfuge. *Betts*, 109 S.Ct. at 2862. The fact that the same plan was later amended and a new rule was added that restricted the amount of the benefits did not take the age 60 rule out of the safe harbor of *McMann*. Only the new rule was subject to analysis and review to determine if it was a subterfuge to evade the purposes of the Act. Only the new rule was analyzed to determine if it was intended to serve the purpose of discriminating in some non-fringe benefit aspect of the employment relation. Likewise, only the new provision in the Farmers' Pension Plan

should be subject to further inquiry; the preexisting Profit-Sharing provision was insulated by *McMann*.

Additionally, the Court of Appeals holding that the two Farmers retirement plans should be treated as one plan is in conflict with ERISA. Section 502(d)(1) provides that an employee benefit plan may be sued as an "entity." 29 U.S.C. § 1132(d)(1). Section 502(d)(2) provides that any money judgment against an employee benefit plan shall be enforceable only against the plan as an entity. 29 U.S.C. § 1132(d)(2). Section 3 of ERISA separately defines a "defined contribution plan" and a "defined benefit plan." 29 U.S.C. § 1002(34) and (35). ERISA requires each plan to have its own plan description, summary plan description, annual report, summary of annual report, and summary of plan modifications. In short, ERISA mandates that a defined benefit plan and a defined contribution plan be separately established, documented and administered. They are not treated as one entity.

C. The Court Of Appeals Decision Also Conflicts With This Court's Decision On Willfulness.

This Court held that a violation of the ADEA is "willful" only if the employer knew or showed reckless disregard for the fact that its conduct was prohibited by the ADEA. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985). This Court in *Thurston* noted that the liquidated damages provision of the ADEA is based upon the Fair Labor Standards Act provisions and cited with approval the definition from *Nabob Oil Co. v. United States*, 190 F.2d 478, 479 (10th Cir.), *cert. denied*, 342 U.S. 876 (1951) that an employer is subject to penalties when he "wholly disregards the law . . .

without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law." This Court also specifically rejected the argument that the violation can be willful if the employer simply knew of the potential applicability of the ADEA.

The Court of Appeals acknowledged that until January 1979 the profit sharing provision in no way could have violated the ADEA. It also acknowledged that the provision under the Profit Sharing Plan that allegedly discriminated had been in place, in substance, since 1965. During 1978, Farmers reviewed its Profit Sharing Plan provisions in light of the amendments to the ADEA, effective January 1, 1979. Farmers sought legal advice from inside and outside counsel as to the legality of its Pension and Profit Sharing Plan provisions. Outside counsel in June 1978 indicated that the amendments to the ADEA did not require contributions to the Pension Plan for employees over age 65. The same counsel indicated that the impact of the amendments on the Profit Sharing Plan was not as clear. He cited Congressional testimony permitting the cessation of such profit sharing contributions, and he concluded that he could not state categorically that the current provision of the Profit Sharing Plan would violate the ADEA.

Farmers reviewed the Department of Labor Interpretative Bulletin when it was issued in 1979. Rather than ignoring the Bulletin, Farmers noted that the Bulletin could be interpreted to require an employer to continue contributions after normal retirement. The in-house attorney who reviewed the Bulletin suggested that Farmers consult with Washington lawyers on the issue. Farmers did consult with and obtained the advice from a Washington law firm that opined that the Bulletin was

inconsistent with the language of the ADEA and with preexisting interpretations of the ADEA. This law firm later filed two actions to declare the Bulletin incorrect, but both actions were dismissed on the basis that the Bulletin was not necessarily being considered by the Department of Labor/EEOC as stating the position of the Department. Eventually, this Court agreed in *Betts* that the Bulletin incorrectly stated the law concerning the requirement of cost-justification to establish a Section 4(f)(2) defense.

During the time that Farmers examined the legality of its Plan, the law regarding contributions to defined contribution and defined benefit plans for employees working after the normal retirement age was very unclear. As recently as 1981, the Internal Revenue Service had ruled in Revenue Ruling 81-210, 1981-2 C.B. 89 that a defined contribution plan, which was amended to increase the mandatory retirement age, could properly provide that no contribution would be made on behalf of the employees who worked beyond the normal retirement age. According to the ABA Section of Labor and Employment Law, the "ability to deny contributions and accruals for post-retirement age service was observed by some as essential to gain passage of the 1978 ADEA amendments . . ." [5] Not until the passage of the Omnibus Reconciliation Act of 1986 (Public Law 99-509) did ERISA, the Internal Revenue Code and the ADEA all clearly prohibit the cessation of contributions and forfeitures upon reaching normal retirement age.

The facts in the present action establish neither that Farmers knew its conduct was prohibited by the ADEA nor that Farmers showed a reckless disregard for

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[5] ABA Section of Labor and Employment Law, *Employee Benefits Law*, 938 (1991).

whether its conduct was prohibited. The evidence shows that Farmers attempted to determine what the law required as to its Profit Sharing Plan, that it did not simply ignore the Bulletin, and that it twice attempted to get guidance from the Court as to a proper interpretation of the ADEA on defined contribution plans. These actions are the antithesis of a reckless disregard for whether the conduct is prohibited. The effect of the Court of Appeals decision is to direct companies, in situations where the law is unclear, to avoid seeking legal advice or using the courts to determine the legality of their practices.

Farmers did not disregard the law but took steps to determine whether its Profit Sharing Plan provision would constitute a violation of that law. To now impose liquidated damages on Farmers' conduct is contrary to this Court's *Thurston* decision.

CONCLUSION

For the reasons set forth above, Petitioners request that a writ of certiorari issue to review the opinion of the Court of Appeals for the Ninth Circuit.

Dated: November 18, 1991.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMERICAN ASSOCIATION OF RETIRED PERSONS; MARGARET J. JASHNI; MARIGO K. MERRICK; HOWARD E. MOORE, et al.,

Plaintiffs-Appellees,

v.

FARMERS GROUP, INC., and its affiliated companies; FARMERS NEW WORLD LIFE INSURANCE COMPANY; THE OHIO STATE LIFE INSURANCE COMPANY; INVESTORS GUARANTY LIFE INSURANCE COMPANY, et al.,

Defendants-Appellants.

No. 90-55872

D.C. No. CV-86-6203-TJH

OPINION

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Argued and Submitted
July 11, 1991—Pasadena, California

Filed August 20, 1991

Before: Stephen Reinhardt and Ferdinand F. Fernandez, Circuit Judges, and Myron D. Crocker, District Judge.*

Opinion by Judge Fernandez

*The Honorable Myron D. Crocker, Senior United States District Judge for the Eastern District of California, sitting by designation.

SUMMARY

Employment Discrimination

Affirming a district court grant of summary judgment, the court of appeals held that an employer's denial of contributions and forfeiture allocations to its profit sharing plan, and its denial of pension plan accruals to employees over the age of 65 violated the Age Discrimination in Employment Act.

American Association of Retired Persons (AARP) and various current or former employees of appellant Farmers Group, Inc., all of whom over the age of 65, sued Farmers for its willful violation of the Age Discrimination in Employment Act (ADEA). The district court granted summary judgment for AARP, holding that Farmers willfully violated ADEA by denying profit sharing contributions and forfeiture allocations and pension plan credits to employees over the age of 65. That court also concluded that denying profit sharing contributions and forfeiture allocations and actuarial increases to pension plan benefits to these employees violated ERISA. The district court found that the purpose of the plan provisions was to discourage people from working past the age of 65, and that each plan was a subterfuge to evade the purposes of ADEA.

[1] ADEA makes it illegal for an employer to discriminate against employees on the basis of age; section 4(f)(2), however, allows an employer to observe the terms of any bona fide employee benefit plan such as retirement, pension, or insurance plan that is not a subterfuge to evade the purposes of ADEA. [2] Section 4(f)(2) requires a plaintiff to prove that a discriminatory provision was intended to serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relation. Thus, in addition to showing that a challenged plan provision is discriminatory on its face, the plaintiff must offer evidence sufficient to raise an inference that the

employer adopted the provison in an attempt to avoid the prohibitions of ADEA. [3] If the plan is not an "employee benefit plan" within the meaning of that section, the plaintiff need not show that the challenged provision is a subterfuge.

[4] Here, when Farmers amended its plan in 1978 to preclude pension payments, actuarial increases, and credits, the concatenation of those provisions constituted a substantial change in the plan as it had theretofore existed. Thus, even though the plan itself existed prior to the enactment of the ADEA, the challenged provisions were adopted afterward, and were not automatically exempt from scrutiny. The court concluded that the provisions discriminated on their face against employees over age 65, and their adoption raised an inference of discriminatory intent. [5] Farmers offered no legitimate, non-discriminatory reason for the denial of post-65 service and salary credits and its change in policy with respect to employment past age 65 and simultaneous collection of retirement benefits. Rather, the evidence supported a determination that, as a business policy, Farmers wanted to get rid of older workers and that the pension plan change was one way to help accomplish that goal. Thus, the district court was justified in concluding that the plan amendments were a subterfuge to evade ADEA.

[6] Farmers' Profit Sharing Plan was a hybrid having aspects of both a retirement plan and immediate compensation. As such, at the very least it did not wholly fall within the section 4(f)(2) exception. [7] As a result, when the 1978 amendment to the ADEA became effective beginning in 1979, the profit sharing plan began to violate the ADEA by denying wages to employees over age 65, solely on the basis of age. Just as Farmers could no longer compel its employees to retire at age 65, it could no longer reduce their compensation at age 65, even if such a result was previously permissible. Because Farmers offered no evidence of a legitimate, non-discriminatory reason for the payment of lower compen-

sation to employees over age 65, the provision was a per se violation of the ADEA.

[8] Viewing the plans as an integrated retirement package, the court concluded that the 1978 amendment to the pension plan worked a significant change in Farmers' retirement package. The court could not hold that Farmers could isolate the plans from one another in an attempt to avoid liability, simply because Farmers did not specifically change the profit sharing plan in 1978. It was clear that the discrimination against older employees from 1978 forward was carried out by the operation of both plans together. Therefore, the district court did not err in concluding that they were a subterfuge to evade the purposes of the Act.

[9] The district court's finding of willfulness under the ADEA was justified. Farmers intended to discriminate against its older employees by the provisions of its plans. Its attempt to secure legal advice to justify, in a post hoc manner, its decision in no way suggested that the ADEA violation was not willful. This satisfied the "reckless disregard" standard of *Thurston*, not because the law was entirely clear, but because Farmers acted without bothering to find out what the law required.

[10] The court disagreed with Farmers' contention that many of the individual plaintiffs should be excluded from recovery because they joined the litigation at too late a date. **[11]** The court held that the EEOC, by filing an action seeking only injunctive relief, did not foreclose injured employees from joining in an ongoing lawsuit that sought relief that the EEOC chose not to pursue. Congress did not intend to preclude private litigants from seeking damages when the EEOC has, in effect, eschewed doing so. Therefore, the district court's decision to permit additional plaintiffs to opt into the private suit after the EEOC filing was not in error.

[12] The court rejected Farmers' argument that liquidated damages awards are only to be applied to "pecuniary loss"

suffered by the employee. Farmers was liable for liquidated damages just as if it had not paid wages to the employees. To the extent that the profit sharing plan was part of the retirement package, the district court's judgment was affirmed. **[13]** In addition, the district court properly awarded the previously retired employees the present value of future pension losses rather than ordering Farmers to adjust their pension payments on a monthly basis.

COUNSEL

Charles F. Barker, John M. Temple, Sheppard, Mullin, Richter & Hampton; Thomas A. Hoffman, Early, Maslach, Nutt & Peterson, Los Angeles, California, for the defendants-appellants.

Raymond C. Fay, Thomas R. Gibbon, Christopher G. Mackaronis, Bell, Boyd & Lloyd; Steven Zaleznick, Cathy Ventrell-Monsees, American Association of Retired Persons, Washington, D.C., for the plaintiffs-appellees.

Donald R. Livingston, Acting General Counsel, Gwendolyn Young Reams, Associate General Counsel, Lorraine C. Davis, Assistant General Counsel, Robert J. Gregory, Washington, D.C., for the Equal Employment Opportunity Commission, as *amicus curiae.*

OPINION

FERNANDEZ, Circuit Judge:

OPINION

Farmers Group, Inc., its affiliated companies, its pension plan trust, and its profit sharing trust (Farmers) appeal the dis-

trict court's grant of summary judgment in favor of American Association of Retired Persons (AARP), and a number of current or former employees of Farmers, all of whom are over age 65 (individual appellees). The district court determined that Farmers willfully violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq., because it denied profit sharing contributions and forfeiture allocations and pension plan credits to employees over the age of 65. The court also held that denying profit sharing contributions and forfeiture allocations and actuarial increases to pension plan benefits to these employees violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, et seq. Farmers also challenges the district court's denial of Farmers' motion to dismiss the complaint as to those appellees who joined the action after the Equal Employment Opportunity Commission (EEOC) filed a complaint against Farmers challenging the profit sharing plan provisions. Further, Farmers challenges the district court's determination of damages. We affirm.

BACKGROUND FACTS

At the time of filing the complaint, the individual appellees were former and current employees of Farmers. Each worked beyond the age of 65. They and AARP (appellees) claimed that Farmers had violated the ADEA, ERISA and various state statutes because it had denied pension plan credits and profit sharing contributions and forfeiture allocations to employees over the age of 65 from January 1, 1979 and was continuing to do so.[1] Farmers has had a profit sharing plan and a pension plan in place since long before the enactment of the ADEA in 1967 and ERISA in 1974. The plans have been modified a number of times since their inception. The

[1]The district court awarded damages from January 1, 1979 to June 1, 1990. Unless otherwise specifically stated, all references to the plan provisions and to actions of the parties refer to this period.

specific amendments relevant to this action will be discussed in detail in later portions of this opinion.

Farmers' profit sharing plan allocates company contributions to a fund in which each employee who meets the time of service and minimum age requirements set forth in the plan is permitted to participate. The plan is a defined contribution plan, rather than a defined benefit plan.[2] Each employee's individual account receives allocations based on a percentage of that person's earnings. In addition to direct contributions, the plan provides that forfeitures[3] are redistributed among vested employee accounts. Employees automatically receive a 20% distribution of their profit sharing account every year after full vesting, unless they irrevocably elect to leave the balance in their account until retirement.[4] Over 90% of employees elect to receive the annual distribution, rather than defer receipt until retirement. The challenged provision of the profit sharing plan provided:

> A Participant who remains on the payroll of any of the Companies after normal retirement date shall not be credited with contributions provided by Article III nor be credited for forfeitures under Article VI.

The plan also prohibited the distribution of account balances to employees aged 65 and older until actual retirement.

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[2]In a defined contribution plan, the employer contribution is fixed or determined by a formula and benefits are based on the contribution of the employer. A defined benefit plan is one in which the contributions to be made are calculated to achieve a specific benefit at a time certain in the future.

[3]Forfeitures occur when employees leave the company prior to full vesting. Until the employee has been a plan participant for five years, his account is not fully vested. Upon termination, the unvested portion is forfeited for redistribution among the remaining employee accounts.

[4]The plan provides for a hardship exception to this election, in the event of financial need.

The plaintiffs challenged the pension plan provision which provided that employees who continued to work after reaching age 65 would not receive additional service or salary credits for purposes of calculating their monthly retirement benefit.[5] An employee was not permitted to begin collecting retirement benefits until actual retirement, and no actuarial increase was provided for the period during which the employee continued to work.

Farmers sought dismissal of the claims of the 24 plaintiffs who opted into the suit after the EEOC filed an action alleging that Farmers' profit sharing plan violated the ADEA. It also sought dismissal of the state law claims, arguing that they were preempted by ERISA. The district court denied Farmers' motions.

All parties moved for summary judgment. On September 22, 1988, the district court granted appellees' motion for summary judgment on liability under the ADEA and ERISA. *See American Ass'n of Retired Persons v. Farmers Group, Inc.*, 700 F. Supp. 1052 (C.D. Cal. 1988). After the Supreme Court decision in *P.E.R.S. v. Betts*, 492 U.S. 158, 109 S. Ct. 2854, 106 L. Ed. 2d 134 (1989), the district court reconsidered its earlier rulings, issued an amended statement of uncontroverted facts and conclusions of law, and again found Farmers liable. The district court later granted appellees' motion for summary judgment on the issue of damages. Farmers timely appealed.

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[5]This provision affected an older employee's benefit because the benefit was calculated by using an individual's average monthly compensation and his years of credited service (up to 35 years). Therefore, if an employee worked past age 65, his retirement benefit would not increase even if his salary during the last five years or his years of service increased.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction under 29 U.S.C. § 626(c)(1(), and 29 U.S.C. § 1132(e)(1). We have jurisdiction under 28 U.S.C. § 1291.

We review the district court's grant of summary judgment de novo. *E.E.O.C. v. County of Orange*, 837 F.2d 420, 421 (9th Cir. 1988). "We must determine, viewing the evidence in the light most favorable to the nonmoving party . . . , whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.*

DISCUSSION

A. The ADEA Claims.

The district court held that Farmers' denial of contributions and forfeiture allocations with respect to the profit sharing plan, and its denial of pension plan accruals violated the ADEA. It further held that the purpose of the plan provisions was to discourage people from working past the age of 65, and that each plan was a subterfuge to evade the purposes of the ADEA. The court found that each plan discriminated against employees who continued to work past age 65 in a non-fringe benefit aspect of their employment. The court further held that the profit sharing plan was a subterfuge because it decreased the compensation of employees over age 65.

[1] Section 4(a)(1) of the ADEA makes it illegal for an employer "to fail or refuse to hire or to discharge any [protected] individual or otherwise discriminate against any [protected] individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ." 29 U.S.C. § 623(a)(1). However, the statute further provides in section 4(f)(2) that it "shall not be unlawful for an employer . . . to observe the terms of . . . any

bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter . . . ." 29 U.S.C. § 623(f)(2).

[2] The Supreme Court has held that section 4(f)(2) requires a plaintiff to prove that a discriminatory provision "was intended to serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relation." *Betts*, 492 U.S. at 181, 109 S. Ct. at 2868.[6] It thus modifies the elements of a plaintiff's prima facie case, *id.*, by requiring that the plaintiff at least raise an inference of discriminatory intent at the outset.[7] Thus, in addition to showing that a challenged plan provision is discriminatory on its face, the plaintiff must offer evidence sufficient to raise an inference that the employer adopted the provision in an attempt to avoid the prohibitions of the ADEA.

[3] If a plan is not an "employee benefit plan" within the meaning of section 4(f)(2), the plaintiff need not show that the challenged provision is a subterfuge. The Supreme Court has not determined "the precise meaning of the phrase 'any bona

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[6]The Court explicitly held that section 4(f)(2) did not "establish[ ] a defense to what otherwise would be a violation of the Act." *Betts*, 492 U.S. at 181, 109 S. Ct. at 2868. *Cf. Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 124-25, 105 S. Ct. 613, 623, 83 L. Ed. 2d 523 (1985) (characterizing sections 4(f)(1) and 4(f)(2) as affirmative defenses to liability).

Appellees argue for the first time on appeal that *Betts* should not be applied retroactively. We conclude that *Betts* should apply retroactively. Retroactivity will clearly further the operation of the rule of *Betts*, and there do not appear to be substantial inequitable results from retroactive application here. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S. Ct. 349, 355, 30 L. Ed. 2d 296 (1971); *Austin v. City of Bisbee*, 855 F.2d 1429, 1432 (9th Cir. 1988). In addition, this circuit has previously applied *Betts* retroactively. *See Robinson v. County of Fresno*, 882 F.2d 444, 445 (9th Cir. 1989) (applying *Betts* without considering its retroactivity under *Chevron Oil*).

[7]Ordinarily, however, when there is direct evidence of discrimination, such as when a provision is discriminatory on its face, the prima facie case analysis is inapplicable. *Thurston*, 469 U.S. at 121, 105 S. Ct. at 621-22.

fide employee benefit plan such as a retirement, pension, or insurance plan.' " *Betts*, 492 U.S. at 174 n.6, 109 S. Ct. at 2865 n.6. But, the Court has held that the phrase could not be limited to "plans in which all age-based reductions in benefits are justified by age-related cost considerations."[6] *Id.* at 175, 109 S. Ct. at 2865. With these general rules in mind, we consider Farmers' pension and profit sharing plans in turn.

1. *The Pension Plan.*

The uncontroverted facts show that the explicit pension plan provisions denying accruals of service and salary credits to employees over age 65 were first adopted on August 4, 1978. The 1976 version of the plan did not include any such provisions. Section 5.8 of that plan did contemplate the possibility of continued employment past age 65, since it provided that if an employee continued employment after the normal retirement age [65], payment of retirement benefits would not be postponed. There was no provision to increase that pension while the person continued to work. The 1978 amendments explicitly changed section 5.8 to provide that no benefit would be paid to a continuing or reemployed employee. They also precluded any actuarial increases in the interim between age 65 and actual retirement. Farmers' argument that the plan provisions merely continued in effect its prior practice is unavailing with respect to this plan, since it contradicts the plan's own provisions. Concededly, Farmers required employees to retire at age 65. Thus, as a practical matter, few or none of its employees had worked while receiving a pension. But the plan did not preclude that possibility if an employee did work beyond normal retirement age, for that was clearly contemplated by the provision allowing simultaneous employment and collection of retirement benefits prior to 1978.

[6]Congress has since declared a contrary rule for the future. *See* 29 U.S.C. § 623(f)(2), as amended October 16, 1990.

In response to the ADEA amendments in 1978, Farmers held numerous internal discussions regarding possible changes to the pension and profit sharing plans. Appellees offered evidence, including the deposition testimony of Farmers' Vice-President of Personnel, David Darvin, to the effect that in the course of those discussions, Farmers considered employee morale. Darvin believed that younger employees' morale might be negatively affected if employees over 65 received the same profit sharing and pension contributions and credits, because younger employees' "career growth and promotional opportunities are limited by others who stay on." There was similar testimony from Rocco DiFonso, who, until at least 1981, was Chairman of the Committee which served as the profit sharing plan administrator. One of the appellees, Virginia Gould, submitted a declaration stating that she was told by a personnel specialist and a personnel manager that Farmers cut off profit sharing and pension benefits at age 65 "because we want you to quit."[9] While Farmers grumbles about the strength of the evidence, it did not place conflicting evidence before the district court at the time of the summary judgment motion.

[4] When Farmers amended the plan to preclude pension payments, actuarial increases, and credits, the concatenation of those provisions constituted a substantial change in the plan as it had theretofore existed. Thus, even though the plan itself existed prior to the enactment of the ADEA, the challenged provisions were adopted afterward, and were not automatically exempt from scrutiny under section 4(f)(2). *Betts*,

[9]At the time of the cross-motions for summary judgment, there was no dispute regarding the declaration of Virginia Gould. Farmers did not submit declarations contradicting Gould's statement until it moved for reconsideration in light of *Betts*. Nothing in the record indicates that the district court agreed to reconsider summary judgment on the basis of evidence which Farmers could have produced earlier but did not. It reconsidered its grant of summary judgment only because of new legal precedent. Even if Gould's evidence were not considered, an inference of discriminatory intent was raised by the other evidence.

492 U.S. at 169, 109 S. Ct. at 2862. The provisions discriminate on their face against employees over age 65. Their adoption after the ADEA was enacted, together with the evidence discussed above, raises an inference of discriminatory intent. Farmers asserts that the amendments were necessary to comply with ERISA. However, the specific denial of post-65 service credits was not necessary to comply with ERISA — the plan needed only to define "service hours" and other relevant terms; there was no need to define them so as to discriminate against employees over age 65. *See* ERISA § 402 (establishment of plan); 29 U.S.C. § 1102 (same); ERISA § 1011 (minimum participation standards); 26 U.S.C. § 410 (same); 29 U.S.C. § 1052 (same).

[5] Farmers offers no legitimate, non-discriminatory reason for the denial of post-65 service and salary credits and its change in policy with respect to employment past age 65 and simultaneous collection of retirement benefits. Rather, the evidence supports a determination that, as a business policy, Farmers wanted to get rid of older workers and that the pension plan change was one way to help accomplish that goal. Whatever some might think about the efficacy of that policy from a business efficiency standpoint, our society has set its face against it. It is no longer permitted by law. The district court was justified in finding that the plan amendments were a subterfuge to evade the ADEA. Summary judgment was appropriate on this issue.

2. *The Profit Sharing Plan.*

The district court determined that Section 7.4 of the Profit Sharing Plan, which specifies that employees who continue to work after age 65 will not receive contributions or forfeitures, did not exist prior to 1976. The court further found that Farmers modified section 7.4 in 1982 to permit a lump sum distribution of a participant's account at age 65 no matter when the employee retired. The previous version of 7.4 did not permit distribution of the account until an employee actually retired.

While as a technical matter, section 7.4 did not exist prior to 1976, the profit sharing plan did previously contain another section which specified that an employee who "remains on the payroll . . . after . . . normal retirement age [65] shall [not] continue as a Participant, or become a Participant in the Plan." This provision or its equivalent existed in the plan from at least December 1965. Thus, it predated the ADEA. The 1976 modifications had the effect of making employees age 65 and over "participants" in the plan, but denied them credits for contributions and forfeitures. Prior to 1976, those employees were not participants and only participants received credit for contributions and forfeitures. Thus, the 1976 plan changed the definition of the term "participant" — before 1976, all "participants" received allocations of contributions and forfeitures, but some classes of employees were excluded as participants. After 1976, all employees who met the minimum employment term and age were "participants," but the plan divided the employee participants into two classes — those under age 65 and those over age 65. However, the effect of the 1976 amendment was not different from earlier provisions of the plan.

We recognize at the outset that the profit sharing plan's denial of contributions and forfeiture allocations to employees over 65 did not violate the ADEA when the plan was amended in 1976 to change the definition of participant, even if that amendment was made with discriminatory intent. Until the ADEA was amended in 1978, it only applied to persons under age 65. *See* 29 U.S.C. § 631(a) (1967) ("The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 65 years of age"). The 1978 amendment extended the ADEA protections to persons under age 70, and also prohibited mandatory retirement of persons under age 70[10], even if called for by a bona fide employee benefit plan. 29 U.S.C. § 631(a); 29 U.S.C. § 623(f)(2).

[10]In 1986, Congress deleted the upper age limit for the class of persons protected by the ADEA. It now protects all persons age 40 and over. 29 U.S.C. § 631(a). Under both the 1978 and 1986 versions of the ADEA, mandatory retirement is permitted for executives who are entitled to a certain level of pension and other post-retirement benefits. 29 U.S.C. § 631(c).

[6] Farmers' Profit Sharing Plan is a hybrid. It has aspects of both a retirement plan and immediate compensation. The way the plan is structured and treated by Farmers' employees, it provides immediate compensation once an employee has been with the company for five years.[11] To that extent, while the plan may for some purposes be an "employee benefit plan," it is wages, too. It is designed to compensate for work actually performed by an employee rather than as a reward for longevity. *Cf. Raypole v. Chemi-Trol Chemical Co., Inc.*, 754 F.2d 169, 172-75 (6th Cir. 1985) (distinguishing between retirement and deferred compensation profit sharing plans under Vietnam Era Veterans' Readjustment Assistance Act and deciding that plan in question was, as a whole, one for compensation). *See also E.E.O.C. v. Westinghouse Elec. Corp.*, 925 F.2d 619, 626 (3d Cir. 1991). In that sense, Farmers' profit sharing plan is not an employee benefit plan under section 4(f)(2), unless all wages are treated as "employee benefits," which can hardly be the meaning of the statute. As such, at the very least the plan does not wholly fall within the section 4(f)(2) exception. *Cf.* 29 C.F.R. § 860.120(b) (1970) (former Department of Labor regulation suggesting that profit sharing plans not within section 4(f)(2) exception unless essential purpose is to provide retirement benefits).

[7] As a result, when the 1978 amendment to the ADEA became effective on January 1, 1979, the profit sharing plan began to violate the ADEA by denying wages to employees

[11]Under the plan, an employee was eligible to receive 20% of his account balance, as of December 31st, 120 days after his fifth December 31st as a plan participant, and 20% of the account balance each year thereafter, unless he irrevocably elected to defer receipt until retirement. The account balance as of any given December 31st included the amounts actually in the account as of that date, adjusted by all charges and allocations for that calendar year, including those which were not required to be made by Farmers until it filed its tax returns for that year. Thus, the employee received almost immediate distribution of 20% of the amounts added to his account that year. In this respect, the plan operated much like a year end bonus program.

over age 65, solely on the basis of age. Just as Farmers could no longer compel its employees to retire at age 65, it could no longer reduce their compensation at age 65, even if such a result was permissible before 1979. That reduction discriminates in a "non-fringe-benefit aspect of the employment relation." *Betts*, 492 U.S. at 181, 109 S. Ct. at 2868. Farmers offered no evidence of a legitimate, non-discriminatory reason for the payment of lower compensation to employees over age 65. Indeed, as we have already pointed out, the evidence was quite to the contrary. The provision is a per se violation of the ADEA. *Thurston*, 469 U.S. at 121, 105 S. Ct. at 621.

Farmers has earnestly argued that the profit sharing plan is really a retirement plan which falls within the section 4(f)(2) exemption. It does, certainly, have something of that aspect, because a continuing employee cannot draw down the whole of an account at any time.[12] No matter how small the account gets, eighty percent is still left after the employee exercises the withdrawal right.[13] However, to the extent that the profit sharing plan is also a retirement plan, then we hold that it must be considered to be part of an integrated retirement package offered by Farmers to its employees. In fact, Farmers itself characterized the two plans as a "retirement program" when it sought summary judgment before the district court. The pension plan was first adopted in 1943, and in 1948 the additional retirement benefits of the profit sharing plan were made available to employees. Working together the two plans gave the employees three things that ordinary wages alone did

[12]Under the plan in effect in 1979, employees who were leaving to open a Farmers' agency could take the whole vested part of their account out in a lump sum. Others who terminated were paid the balance of their accounts in five equal annual payments after termination. In 1985, the plan was amended so that all employees who terminate employment (for reasons other than death, disability or retirement) receive the whole of their account balances over a five year period. This also undercuts the retirement aspect of the profit sharing plan.

[13]This, of course, assumes that some economic disaster has not greatly reduced values between December 31 and the end of the 120 day period.

not give them: an increase in salary after five years, a defined benefit retirement plan, and, in part, a defined contribution retirement plan. *Cf. E.E.O.C. v. Borden's Inc.*, 724 F.2d 1390, 1396-97 (9th Cir. 1984), *overruled on other grounds, Betts*, 492 U.S. at 173-75, 109 S. Ct. at 2864-65; 29 C.F.R. § 860.120(f)(2) (1979) (discussing "benefit package" approach to compliance with section 4(f)(2) to permit reductions in some benefits offset by increase or no change in other benefits, but stating that such an approach is not applicable to retirement plans, at least as to offsetting retirement and non-retirement benefits).

In other words, to the extent that the profit sharing plan is a retirement plan, it supplements[14] and complements the pension plan so that a change in one plan substantially affects the individual employee's entire retirement package. We must assume that an employee would review that whole package when determining what benefits would be available upon retirement. It goes without saying that an employer, like Farmers, treats benefits in a similar fashion. That is to say, a person contemplating his benefits from the company would, as no doubt intended, consider his retirement benefits to be a mixture of the benefits provided by these two plans.

[8] Viewing the plans as an integrated retirement package, we conclude that the 1978 amendment to the pension plan worked a significant change in Farmers' retirement package. We are bolstered in this conclusion by the fact that Farmers,

[14]Assuming that the profit sharing plan is a retirement plan, under the 1979 Labor Department regulations, the plan would have been considered a "supplemental" defined contribution plan because Farmers also maintains a defined benefit plan (the pension plan). 29 C.F.R. § 860.120(f)(iv)(B)(1). These regulations provided that an employer could cease contributions to a defined contribution plan which was *not* a supplemental plan, but stated that the provisions did not apply to supplementary plans. *Id.* The provisions also stated that an employer could not allocate forfeitures less favorably on the basis of age, regardless of whether a defined contribution plan was supplemental or not. 29 C.F.R. § 860.120(f)(iv)(B)(2).

in response to ERISA and the ADEA, considered both plans together and decided to do what it could to force people to retire at its chosen retirement age. It made the entire benefits package as undesirable as possible for persons over age 65. It had already done so as far as the profit sharing plan component was concerned; it completed the task by changing the pension plan component in 1978. We would thus blink at reality if we held that Farmers could isolate the plans from one another in an attempt to avoid liability, simply because Farmers did not specifically change the profit sharing plan in 1978. It is clear that the discrimination against older employees from 1978 forward was carried out by the operation of both plans together. Thus, the profit sharing plan is not insulated from challenge simply because similar provisions existed in plans which predated the ADEA's application to those over 65 years of age. *See Robinson v. County of Fresno*, 882 F.2d 444 (9th Cir. 1989). *See also, United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203, 98 S. Ct. 444, 450, 54 L. Ed. 2d 402 (1977).

Farmers now contends that there was no intent to force or encourage employees over age 65 to retire. Yet it offered nothing to contradict the testimony of its own employees that Farmers was motivated by its concern that younger employees would lack advancement opportunities if more older employees stayed on. And Farmers has not offered any other plausible reason — or any non-discriminatory reason at all — for its policy of denying credits for contributions and allocations to employees over age 65. There was no showing that provision of those benefits would have imposed additional costs on Farmers.[15] In the face of direct evidence of discrimination and

[15]We recognize *Betts*' holding that an employer need not prove cost justification in order to avoid a finding of subterfuge. 492 U.S. at 175, 109 S. Ct. at 2865. However, *Betts* did not make cost totally irrelevant to the inquiry. Certainly there is nothing in this record to suggest that Farmers' decision was driven by mere cost considerations rather than considerations of a more malevolent sort.

discriminatory intent, Farmers has failed to offer evidence of a legitimate, non-discriminatory reason for the challenged provisions. The provisions discriminate in a "non-fringe-benefit aspect of the employment relation," *Betts*, 492 U.S. at 181, 109 S. Ct. at 2868, by discouraging persons over age 65 from remaining in Farmers' employ. The district court did not err in concluding that they were a subterfuge to evade the purposes of the act.

B. Willfulness Under The ADEA.

An employer's violation of the ADEA is willful where the " 'employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' " *Thurston*, 469 U.S. at 128, 105 S. Ct. at 625. There is no question that the ADEA prohibited a wage differential based solely on the age of the employee. In addition, though the law surrounding the propriety of Farmers' profit sharing plan provisions might have been somewhat unsettled, the Department of Labor had issued a regulation to the effect that most profit sharing plans were not included within the purview of section 4(f)(2). 29 C.F.R. § 860.120(b) (1970). Moreover, even though section 4(f)(2) was determined not to be a "cost-justification" rule by the *Betts* Court, that does not mean that a provision which was adopted as a subterfuge would be permissible under the ADEA.

[9] The district court's finding of willfulness is justified. Farmers sought legal advice about the legality of the challenged provisions. Its in-house and outside attorneys advised it that the provisions were not authorized under the ADEA or the Department of Labor interpretation. But most importantly, the evidence shows that Farmers, without waiting to get the legal advice it sought, made a decision in 1978 to continue the provisions in effect, and even to enhance their bite by taking away benefits in the other part of the retirement package — the pension plan. In addition, Farmers intended to discriminate against older employees by the provisions of its plans. Its

attempt to secure legal advice to justify, in a post hoc manner, its decision in no way suggests that the ADEA violation was not willful. It only bespeaks an attempt to obtain comfort for a course of conduct already decided upon. When that comfort was slow in coming, Farmers did not deviate from its predecided course. This satisfies the "reckless disregard" standard of *Thurston*, not because the law was entirely clear, but because Farmers acted without bothering to find out what the law required.

C. The Joinder of Additional Appellees.

[10] Farmers contends that many of the individual appellees should be excluded from recovery because they joined the litigation at too late a date. We disagree.

The ADEA permits enforcement by an action filed by or on behalf of aggrieved employees. 29 U.S.C. § 626(b). Section 626(b) provides that the procedures of 29 U.S.C. § 216(b) and (c), inter alia, shall be used to enforce the provisions of the ADEA. Section 216(b) provides as follows:

> An action to recover the liability prescribed . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. . . . The right provided by this subsection to bring an action by or on behalf of any employee and the right of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the [EEOC] in an action . . . in which (1) restraint is sought of any further delay in the payment of unpaid . . . compensation . . . .

Id. See also 29 U.S.C. § 216(c) (employee's right to become party to private action terminates when Secretary [EEOC] brings action for recovery of unpaid amounts); 29 U.S.C.

§ 626(b) and (c) (right to bring action terminates upon EEOC's commencement of action to enforce the right of employee under ADEA).

Under these statutes, the right of the additional parties to become plaintiffs, at least as to the claim that the profit sharing plan provisions violated the ADEA[16], would have terminated when the EEOC filed its action on September 30, 1986, if the EEOC had sought recovery of the amounts owed to them by Farmers. However, the EEOC's initial complaint sought only injunctive relief. Though the complaint purports to sue on behalf of the class of employees to which the individual appellees belong, it neither sought damages for lost benefits on their behalf, nor named *any* employee on whose behalf relief was or would be sought. It was not until October 20, 1987 that the EEOC sought to amend its complaint to request that Farmers' employees be awarded damages for the lost benefits caused by Farmers' unlawful policy. At that time it, in apparent recognition of the propriety of what had occurred in this action, failed to name the individual appellees, save two who were inadvertently named in the EEOC amendments.

[11] We hold that the EEOC, by filing an action seeking only injunctive relief, did not foreclose injured employees from joining in an ongoing lawsuit which sought relief that the EEOC chose not to pursue. We recognize that Congress wished to give the EEOC primary enforcement power under the ADEA. *See E.E.O.C. v. Pan American World Airways, Inc.*, 897 F.2d 1499, 1507 (9th Cir.), *cert. denied*, 111 S. Ct. 55, 112 L. Ed. 2d 31 (1990). That, however, does not require us to conclude that Congress intended to preclude private litigants from seeking damages when the EEOC has, in effect, eschewed doing so.

[16]The EEOC action alleged only that the profit sharing plan violated the ADEA. It did not request any relief with respect to the pension plan.

Pan American does not require a different result. While at first glance its broad language might seem to foreclose the result we reach here, that case involved individuals seeking to intervene in an action brought by the EEOC because their right to damages from their former employer arising out of the same wrongful conduct was being terminated in the suit. The individuals had not taken advantage of opportunities to be included in the EEOC action. They were not seeking relief different from that sought by the EEOC. Furthermore, they sought to interfere with the EEOC's handling of the litigation it had brought and settled. In the case at hand, the EEOC quite clearly coordinated its later brought action with that of the appellees. In fact, it submitted an amicus brief to us in which it urged the merits of appellees action. At no point did it assert that its dominant role in the enforcement of the ADEA was being undermined by this action. Rather, this case shows a commendable coordination of efforts.

The district court's decision to permit additional plaintiffs to opt into the private suit after the EEOC filing was not in error.

D. Damages.

The ADEA permits the court to grant "such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments ... enforcing the liability for amounts" of unpaid wages and benefits. 29 U.S.C. § 626(b). The statute does not purport to limit an employee to having an account properly credited (equitable relief) rather than receiving a damage award (legal relief). The statute also authorizes liquidated damages awards for willful violations.

Farmers contends that the district court erred when it awarded liquidated damages to three plaintiffs who had not yet withdrawn any amounts from their profit sharing plans. Farmers contends that liquidated damages awards are only to

be applied to "pecuniary loss" suffered by the employee. It cites *Brown v. M & M/Mars*, 883 F.2d 505, 515 (7th Cir. 1989) for this proposition. In *Brown*, the court held that an employee could not receive liquidated damages for pension benefits which he had not lost.[17]

[12] To the extent that the profit sharing plan here is part of compensation, Farmers' argument fails. Farmers would be liable for liquidated damages just as if it had not paid wages to the employees. To the extent that the profit sharing plan is part of the retirement package, the district court's judgment in this respect should also stand. The fortuitous fact that the employees chose not to withdraw the fully vested amounts in their profit sharing plans at the time they were eligible to do so does not relieve Farmers of liability for its willful violation of the ADEA. Unlike the employer in *Brown*, Farmers has not pledged to make the proper credits to the individual appellees' accounts. The district court was not asked to order Farmers to do so, but instead was asked to award damages. It exercised its discretion to do so, and its award of liquidated damages to appellees was not an abuse of discretion.

[13] Farmers also contends that the district court erred in awarding the previously retired appellees the present value of future pension losses rather than ordering Farmers to adjust their pension payments on a monthly basis.[18] The district court's order was entirely proper. *See Kelly v. American Standard, Inc.*, 640 F.2d 974, 986 n.20 (9th Cir. 1981); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1021 (1st Cir. 1979),

[17]Brown had not lost any pension benefits because he had asked to be reinstated to employment and the court had ordered his reinstatement. The employer had represented to the court that upon Brown's reinstatement, it would fully credit his pension plan as if he had continued working. Thus, at Brown's retirement, he would receive the same pension as if he had not been unlawfully fired. 883 F.2d at 514-15.

[18]All appellees who had not retired as of December 1, 1988 were to have their pension benefits adjusted pursuant to changes in the law and the pension plan.

disapproved on other grounds, Thurston, 469 U.S. at 126 n.19, 105 S. Ct. at 624 n.19.

CONCLUSION

Over the many years since the ADEA was first enacted, Farmers has been resolute in its opposition to the policies and purposes that animated that legislation. It embraced every opportunity to restrict benefits for older workers and ultimately went too far. As a result, it violated the ADEA by depriving older workers of the benefits to which they would otherwise have been entitled and by doing so for the purpose of driving them into retirement.[19] Therefore, despite Farmers' jeremiads and febrile arguments it must now make the individual appellees whole.

AFFIRMED.

[19]The district court found that Farmers had also violated ERISA. We do not decide that issue, since it was simply an alternate ground for the district court's decision, a decision which was fully supported by its ADEA determination. Appellees also made claims under state law. The district court did not found Farmers' liability upon those state law claims, and no cross-appeal was taken by the appellees. Thus, that issue is not properly before us.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
JUN 5 1990
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AMERICAN ASSOCIATION OF RETIRED PERSONS, *et al.*,
Plaintiffs,

v.

FARMERS GROUP, INC., *et al.*,
Defendants.

No. CV-86-6203 TJH (GX)
FINAL JUDGMENT

On September 26, 1988, this Court entered judgment for plaintiffs on liability. Upon consideration of plaintiffs' motion for summary judgment for damages, it is ORDERED, ADJUDGED and DECREED that

1. Plaintiffs' motion is granted.

2. Plaintiffs are awarded $1,769,380.35 in damages for defendants' violations of the Age Discrimination in Employment Act and the Employee Retirement Income Security Act as follows:

NAME		DAMAGES AWARDED
1.	Mildred Abramson	53,850.01
2.	Vesta Agnew	102,715.74
3.	Howard D. Bellows	150,112.94
4.	Ronald E. Blair	52,412.80
5.	Carolyn J. Blume	48,061.55
6.	Florence B. Bodi	46,536.68

7.	Annabelle M. Chapman	78,387.70
8.	Frances L. Churchill	20,399.99
9.	Carol Clubb	27,669.76
10.	Roy N. Eichelberger	74,826.62
11.	Eva L. Gaskill	107,804.16
12.	Ethel Giventer	81,005.22
13.	Virginia D. Gould	105,817.63
14.	Margaret J. Jashni	61,539.92
15.	Thelma Lamoreaux	5,431.32
16.	Marigo K. Merrick	22,303.58
17.	Herbert L. Miller	25,311.51
18.	Howard E. Moore	87,940.08
19.	Richard S. Moore	252,965.98
20.	Charles M. Morris	37,627.72
21.	Rose M. Parr	75,315.88
22.	Harold Punches	44,405.24
23.	Pattison Sprague	71,063.42
24.	Germaine Stiles	11,155.06
25.	Carol V. Sullivan	23,750.66
26.	Theodore Undesser	18,698.95
27.	Duane D. Vanguilder	27,265.50
28.	Dorothy M. Wagner	8,448.38
29.	Letitia R. Wallace	34,084.06
30.	Warren Z. Walter	12,472.29

3. Defendants are ordered to comply with those provisions of the proposed Treasury regulations which require that Farmers Group employees retiring on or after December 1, 1988 be given credit under Farmers Group, Inc. Employees' Pension Plan for service and salary for all employment after normal retirement age. *See* Income Taxes; Continued Accruals Beyond Normal Retirement Age, 53 Fed. Reg. 11876, 11884 (April 11, 1988) (proposed Treasury Regulation § 1.411(b)-2(f)(1)(ii)).

Dated: June 1, 1990

Terry J. Hatter, Jr.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
JUN 18 1990
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AMERICAN ASSOCIATION OF RETIRED PERSONS, *et al.*,
Plaintiffs,
v.
FARMERS GROUP, INC., *et al.*,
Defendants.

No. CV-86-6203 TJH (GX)

AMENDED STATEMENT OF FACTS AND CONCLUSIONS OF LAW [REVISED AND PROPOSED]

UNCONTROVERTED FACTS

A. PROFIT SHARING PLAN

1. Individual plaintiffs are 30 current or former employees of Farmers Group, Inc. and its affiliated companies ("Farmers") who continued to work at Farmers beyond their 65th birthdays. PX 27.[1] Before plaintiffs reached age 65, they received their full share of profits under the Profit Sharing Plan. *Id.* After

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[1] Plaintiffs' Exhibits (PXs) are attached to the Declaration of Thomas R. Gibbon. Deposition extracts are also attached to the Gibbon Declaration.

plaintiffs reached age 65, they did not receive additional profit sharing contributions or allocations or forfeitures under the plan during their employment with Farmers. Answer, ¶ 12; Foster Dep. at 15.

2. Under the terms of the Profit Sharing Plan, Farmers makes periodic contributions to the plan's Trust Fund from its profits for the benefit of the plan's participants. Answer, ¶ 10. The plan administrator maintains an individual profit-sharing account for each eligible employee. *Id.* The balances in the accounts reflect the participants' individual shares of the periodic contributions by Farmers, as well as an allocation of forfeitures and investment earnings. *Id.*; Foster Dep. 15. Since the 1970s eligible participants have received each year into their account an amount equal to approximately 15% of their salary. PX 27; DiFonso Dep. 17.

3. In addition to the annual contributions, participants also receive an annual allocation of forfeitures. A forfeiture occurs when an employee leaves the company prior to vesting and the account balance is redistributed to vested employees. PX 4AA-Art. VI. Finally, the participants are credited with investment earnings on the balance in the individual's account. Foster Dep. 14.

4. After five years in the plan, participants are provided annual cash distributions equal to 20% of the balances in their accounts. Foster Dep. 17-18; Answer, ¶ 11. To prevent the 20% annual distribution, the individual is required to make an election that some or all of the distribution be deferred. *Id.* Even if an election is made to defer the annual distribution, the amounts may subsequently be distributed in the event of financial need. *Id.* Only about 10% of the participants actually elect to defer the cash distributions. PX 2 at Exh. F.

5. After an employee has reached age 65, Farmers excludes the employee from receiving any additional

contributions or allocation of forfeitures, even though the individual continues to be employed. Answer, ¶ 12.

6. Section 7.4 of the Profit Sharing Plan provides:

> A Participant who remains on the payroll of any of the Companies after normal retirement date shall not be credited with contributions provided by Article III nor be credited for forfeitures under Article VI.

PX 4-AA, sec. 7.4.

7. The effect of section 7.4 is to decrease the compensation paid to employees age 65 and over. Darvin Dep. 15-17.

8. Prior to 1976, section 7.4 of the Profit Sharing Plan did not exist. It was first inserted into the plan by means of a December 20, 1976 amendment to the plan. The 1976 version of section 7.4 did not permit distribution of the account balances of employees age 65 and over until they actually retired. PX 4-T, sec. 7.4.

9. In 1982, Farmers amended Section 7.4 of the Profit Sharing Plan to permit a lump sum distribution of the account at age 65, regardless of the date of retirement. The 1982 plan amendment also shortened the alternative payout period from 15 years from the date of retirement to five years. PX 4-W.

10. Since the adoption of section 7.4 in late 1976, defendants had numerous internal discussions about whether Farmers should change its treatment of employees age 65 and over under the Profit Sharing Plan. Darvin Dep. 52; DiFonso Dep. 57-58.

11. In response to the 1978 ADEA amendments prohibiting mandatory retirement at age 65, David Darvin, Farmers Vice-President of Personnel and member of the committee charged with administering the Deferred Profit Sharing Plan, requested on June 1, 1978 that the Company receive informed outside legal

counsel's opinion on whether Farmers could exclude employees over age 65 from the Profit Sharing Plan. PX 7; Darvin Dep. 6-8. Without waiting for the opinion, Farmers issued a Bulletin which announced the new company policy that employees could continue their employment beyond age 65, but that they would not be credited with contributions or forfeitures to the Profit Sharing Plan. PX 8. A week after the Bulletin, the Company received the opinion from outside counsel. It stated that there was "no specific statutory provision authorizing the [age-65 profit sharing] exclusion." PX 9.

12. In April, 1979, the issue was raised again when Mr. Darvin received a memorandum from Mr. Nikolai, Director of Equal Employment Opportunity and an employee Mr. Darvin relied on in these areas. Darvin Dep. 77; Nikolai Dep. 6. The memo concluded that under Department of Labor regulations, "it would not appear we could continue to exclude employees over 65 from participation in further contributions to the Deferred Profit Sharing Plan, since this does not involve cost considerations based on age." PX 10. Two months later, Farmers' inside counsel informed Farmers' Personnel Department that, "consistent with Department of Labor's standing interpreparation [*sic*] of the ADEA," the DOL Interpretative Bulletin required contributions to be continued for employees who worked past normal retirement age and were covered by a "supplemental" defined contribution plan. PX 11.

13. Subsequently, Farmers sought advice from different outside counsel (PX 13) and, based on that advice, twice unsuccessfully attempted to challenge through lawsuits the provisions of the DOL Interpretative Bulletin which required continued contributions for supplemental plans. *Farmers Group, Inc. v. Marshall*, No. 80-2110 (D.C. Cir., dismissed Nov. 5, 1981) and

Farmers Group, Inc. v. Thomas, No. 84-1457 (D.D.C., dismissed May 3, 1985).

14. There are no age-related cost considerations justifying the difference in treatment under the Profit Sharing Plan between employees under age 65 and employees over age 65. Since Profit Sharing Plan contributions are based upon a strict percentage of salary, it would cost no more to fund the Profit Sharing contribution to an older employee than to a younger employee with the same salary. Foster Dep. 56-57.

14A. The purpose of Farmers' denial of contributions and forfeitures to employees age 65 and over who continue to work is to discourage people from working past the normal retirement age in order to improve employee morale by providing room for more junior employees to move forward.

B. PENSION PLAN

15. The Pension Plan is a defined benefit plan which pays a monthly benefit for life based upon a formula which multiplies a percentage of the individual's average monthly compensation times years of credited services. Answer, ¶ 16; PX 5-0, §5.1; *see id.*, §§2.5, 2.11.

16. Before plaintiffs reached age 65, they received their full benefit accruals under the Pension Plan. Answer ¶ 16. After employees reach age 65, they no longer are given service or salary credit for purposes of computing the monthly retirement benefit. Answer ¶ 16; PX 5-H, §§2.19(c), 2.25(c), 3.3(c); PX 5-0, §§2.20(c), 2.26(c), 3.3(c). Thus, the benefit under the Pension Plan is frozen at age 65. Answer, ¶ 17. Payment of this frozen benefit is commenced not when the individual reaches normal retirement age of 65, but only when the employee actually terminates services. PX 5-H, Sec. 5.10; PX 5-0, §5.11.

17. No actuarial increase is provided to compensate for the pension payments which are suspended during the employee's post-65 employment. Answer ¶ 17. Employees working beyond age 65 receive a reduction in actuarily projected lifetime pension benefit payments in comparison with those actually projected if employment beyond age 65 had not occurred. *Id.*

18. The Pension Plan provisions which excluded employees age 65 and over from continued pension accruals were first adopted on August 4, 1978. *Compare* PX 5-H with PX 20; DiFonso Dep. 34-50. The changes were prompted by the 1978 amendments to the ADEA which prohibited mandatory retirement before age 70. In a May 22, 1978 memorandum, Farmers' in-house counsel T. Hoffman (counsel of record in the instant case) recommended that the Pension Plan should be amended to freeze benefit accruals at the normal retirement age. PX 6. A month later, without amending the Pension Plan, Farmers issued a Bulletin to all employees announcing that if employees continued to work beyond age 65, Farmers would withhold the pension until actual retirement, it would deny credit for years of service or salary after age 65 in determining the amount of the pension, and it would not provide an actuarial equivalent at retirement. PX 8.

19. Defendants have presented no age-related cost considerations justifying the difference in treatment under the Pension Plan between employees over age 65 and employees under age 65.

20. The purpose of Farmers' denial of service and salary accruals to employees age 65 and over who continue to work is to discourage people from working past the normal retirement age in order to improve employee morale by providing room for more junior employees to move forward.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action pursuant to 29 U.S.C. §§626, 1132, and 28 U.S.C. §1331.

2. Defendants' Profit Sharing Plan and Pension Plan are an unlawful subterfuge to evade the purposes of the ADEA because defendants' refusal to provide profit sharing contributions and forfeiture allocations and pension plan accruals to employees working beyond the age of 65 is a scheme to exhort employees to retire at age 65 for the purpose of providing employment opportunities to younger employees. This scheme is a method to discriminate against employees who continue to work beyond age 65 in a non-fringe-benefit aspect of their employment relationship. *Public Employees Retirement System of Ohio v. Betts*, 109 S.Ct. 2854 (1989).

3. Defendants' Profit Sharing Plan is an unlawful subterfuge to evade the purposes of the ADEA because defendants' refusal to provide profit sharing contributions and forfeitures decreases the compensation paid to employees age 65 and over and discriminates against employees who continue to work beyond age 65 in a non-fringe benefit aspect of their employment relationship. *Public Employees Retirement System of Ohio v. Betts.*

4. Defendants' violation of the ADEA with respect to the profit sharing plan is "willful" within the meaning of 29 U.S.C. §626(b). *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985); *Cassino v. Reichold Chemicals, Inc.*, 817 F.2d 1338, 1348 (9th Cir. 1987).

5. Defendants' denial of profit sharing contributions and forfeiture allocations to employees beyond age 65 violates Section 202(a)(2) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1052(a)(2).

6. Defendants' denial of actuarial increases to pension plan benefits of employees beyond age 65

constitutes an impermissible forfeiture of benefits in violation of Section 203(a) of ERISA, 29 U.S.C. §1053(a).

IT IS SO ORDERED:

Dated: May 21, 1990

Terry J. Hatter, Jr.
United States District Judge

(2)

No. 91-827

Supreme Court, U.S.
FILED
DEC 26 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FARMERS GROUP, INC., *et al.*,
Petitioners,

v.

AMERICAN ASSOCIATION OF RETIRED PERSONS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS AMERICAN ASSOCIATION OF RETIRED PERSONS, *ET AL.*

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December 1991

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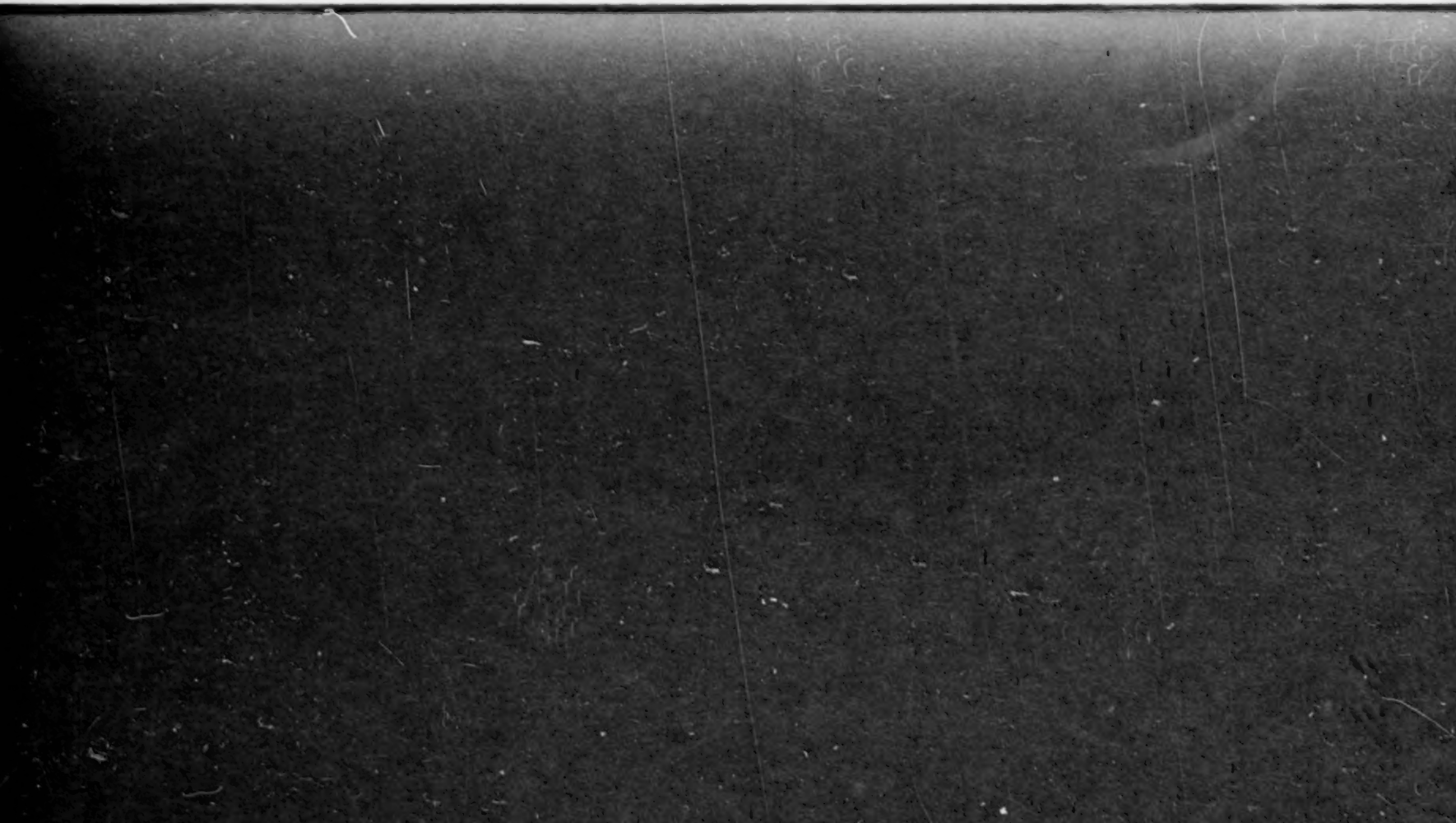

QUESTION PRESENTED

Whether the summary judgment findings below are consistent with this Court's ADEA decisions in *McMann*, *Betts*, and *Thurston*.

RULE 29.1 STATEMENT

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than thirty-four million persons age fifty and older, and as such has no parent or subsidiary company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
I. THERE IS NO CONFLICT WITH *BETTS*	2
II. THERE IS NO CONFLICT WITH ERISA OR THE TAX CODE	4
III. THERE IS NO CONFLICT WITH *MCMANN*	5
IV. THERE IS NO CONFLICT WITH *THURSTON*	6
CONCLUSION	7

TABLE OF AUTHORITIES

Cases Page

EEOC v. County of Orange, 837 F.2d 420 (9th Cir. 1988) 6
EEOC v. Home Insurance Co., 672 F.2d 252 (2d Cir. 1982) 6
EEOC v. FLRA, 476 U.S. 19 (1986) 4
Public Employees Retirement System v. Betts, 492 U.S. 158 (1989) 2, 3
Puckett v. United Air Lines, Inc., 704 F. Supp. 145 (N.D. Ill. 1989) 5, 6
Smart v. Porter Paint Co., 630 F.2d 490 (7th Cir. 1980) 6
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) 2, 7
United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) 2, 5, 6

Statutes

Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634 (ADEA) ..... *passim*
Section 4(a), 29 U.S.C. § 623(a) 3, 4
Section 4(f)(2), 29 U.S.C. § 623(f)(2) 2, 3, 4, 5
Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1974) (ERISA) 4, 5
§ 1052(a)(2) 5
Older Workers Benefit Protection, Pub. L. No. 101-433, 104 Stat. 978 (1990) 2
Omnibus Budget Reconciliation Act of 1986, Title IX, Pub. L. No. 99-509, 100 Stat. 1973-80 (1986) 2

Regulatory Materials

29 C.F.R. § 860.120(b) (1970) 3
44 Fed. Reg. 30648 (May 25, 1979) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-827

FARMERS GROUP, INC., *et al.*,
Petitioners,

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AMERICAN ASSOCIATION OF RETIRED PERSONS, *et al.*,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS AMERICAN ASSOCIATION OF RETIRED PERSONS, *ET AL.*

STATEMENT OF THE CASE

The facts are fully and accurately set forth in the court of appeals' opinion (App. A5-A8, A11-A14, A19) and in the findings of the district court (App. C1-C6). Petitioners' revision of the facts in selective fashion should be disregarded in favor of the complete picture presented in the lower courts' decisions on cross-motions for summary judgment. Two prominent examples of the holes in petitioners' recital of the facts are: (1) petitioners omit mention of the profit sharing plan's immediate payment features utilized by 90 per cent of eligible employees that led the court of appeals to determine that the arrangement was "a hybrid," with "aspects of both a

retirement plan and immediate compensation" (App. A15); and (2) petitioners fail to mention that they took the challenged actions in 1978 without waiting for the legal advice relied upon (App. A19), and took action "for the purpose of driving [older workers] into retirement" (App. A24).

REASONS FOR DENYING THE WRIT

The dispute over post-normal retirement age pension accruals and contributions once loomed as an issue of importance to those individuals working beyond age 65. It now is largely an historical footnote in the law and should not command the attention of this Court. In Title IX of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1973-80 (1986), Congress established definitive ground rules in favor of post-age 65 accruals and contributions. Also, in the Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990), Congress overturned *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989), and overturned the relevant portion of *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977).

The petition presents no conflict among the circuits on any issue and presents no issue of conflict between this case and the decisions in *McMann*, *Betts*, or *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). The lower court decisions here involve routine applications of these cases on the basis of undisputed facts on cross-motions for summary judgment. The petition essentially reargues the undisputed facts affecting a controversy between private parties, and presents no significant legal issues of broader public importance.

I. THERE IS NO CONFLICT WITH *BETTS*

This Court in *Betts* interpreted ADEA Section 4(f)(2), 29 U.S.C. § 623(f)(2), to require a plaintiff to prove that "the discriminatory plan provision actually was

intended to serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relation." 492 U.S. at 181. Although petitioners complain about the alternative holding by the court of appeals that profit sharing is wages (App. A15), the court of appeals also considered the profit sharing plan to be a "retirement plan" under Section 4(f)(2) in applying the rule in *Betts* (App. A16). The petition presents no issue warranting review because the courts below found on undisputed facts that petitioners intended to discriminate in the nonfringe-benefit aspects of employment. Petitioners deliberated on and made changes in the retirement program in 1978 out of concern for the morale of younger people moving up the employment ladder, and because they wanted age 65 employees to quit (App. A12-A13, A18, C3-C6).

The court of appeals' alternative holding that profit sharing constitutes "wages, too" (App. A15) is likewise consistent with *Betts*.[1] The nonfringe-benefit aspects of employment were defined by this Court to include "hiring and firing, wages and salaries, and other non-fringe-benefit terms and conditions" covered in the substantive provisions in ADEA Section 4(a), 29 U.S.C. § 623(a). 492 U.S. at 177. If the differential treatment is in wages, not fringe benefits, the "subterfuge" element of Section

[1] The court of appeals' finding turned on the specific features of the profit sharing plan at issue, including the fact that its "immediate compensation" aspect operated "much like a year end bonus program" (App. A15 n.11). There is no general rule regarding the definitional boundaries of a "plan" under Section 4(f)(2). *See Betts*, 492 U.S. at 175 n.6 ("We express no opinion, of course, on the precise meaning of the phrase 'any bona fide employee benefit plan such as a retirement, pension, or insurance plan.'"). For this reason, the citation to a Title VII regulation (Pet. 8) is inconclusive. The original ADEA interpretations contemplated that profit sharing plans would not qualify as Section 4(f)(2) plans unless their essential purpose is to provide retirement benefits. 29 C.F.R. § 860.120(b) (1970) (App. A15); *see Betts*, 492 U.S. at 174-75 n.6).

4(f)(2) as defined in *Betts* does not come into play, and the discrimination is judged under ADEA Section 4(a). *See* App. A10. *Betts* did not limit or redefine the methods of proof which traditionally have been accepted by the courts in establishing unlawful discrimination in the non-fringe-benefit area under Section 4(a). In this light, and because no legitimate nondiscriminatory reason for petitioners' actions was offered, the court of appeals was correct in holding that petitioners committed a *per se* violation of the ADEA (App. A16).

II. THERE IS NO CONFLICT WITH ERISA OR THE TAX CODE

Petitioners argue that the court of appeals' alternative holding that profit sharing constitutes wages under the ADEA creates potential conflicts with ERISA and the Internal Revenue Code. This argument was not raised below and therefore should not be considered for the first time in this Court. *EEOC v. FLRA*, 476 U.S. 19, 24 (1986).

Moreover, the Ninth Circuit's alternative holding will cause no harm to the tax-qualified status of this or any other employee benefit plan under ERISA or the Internal Revenue Code. The tax rules are administered pursuant to a different legal scheme. There simply is no reason why the profit sharing plan cannot be a qualified plan under ERISA and yet not meet the independent requirements for a "bona fide employee benefit plan" under ADEA. *Cf.* 44 Fed. Reg. 30648, 30655 (May 25, 1979) (compliance with ADEA interpretation "could not justify non-compliance with this (or any other) provision of ERISA").

Additionally, the judgment regarding the profit sharing plan is wholly sustainable on other grounds which were considered below and are separate from the "wage" holding. First, the court of appeals held that the profit sharing plan was a "retirement plan," but that it was a sub-

terfuge under Section 4(f)(2) (App. A16-A19). Second, with respect to ERISA itself, the district court found that the age cutoff in the profit sharing plan violated the plain language of ERISA that "[n]o pension plan may exclude from participation (on the basis of age) employees who have attained a specified age. . . ." 29 U.S.C. § 1052(a)(2) (App. C7).[2] *See Puckett v. United Air Lines, Inc.*, 704 F. Supp. 145, 149 (N.D. Ill. 1989).

III. THERE IS NO CONFLICT WITH *MCMANN*

Petitioners' argument that the court of appeals' decision is inconsistent with the "automatic rule" of *McMann* protecting pre-ADEA plan provisions is limited to that aspect of the decision under which the profit sharing plan is considered a Section 4(f)(2) plan. Under the finding that profit sharing is wages, not fringe benefits, there can be no conflict with *McMann* because the *McMann* "automatic rule" is concerned only with Section 4(f)(2) "plan" provisions.

There is no conflict with *McMann* when the profit sharing plan is viewed as a Section 4(f)(2) retirement plan. Petitioners' argument is based on an exaggeration of the findings below on the *McMann* issue. The court of appeals did not hold that the pension and profit sharing plans were to be treated as "one plan" (Pet. 14). The court found that the profit sharing plan was "part of an integrated retirement package" (App. A16), based in part on petitioners' own characterization of the two plans as a "retirement program" (*id.*). Similarly, the court of appeals did not rest its *McMann* holding solely on the fact that petitioners changed the pension plan in 1978, as petitioners assert (Pet. 13). Instead, the court found that "Farmers . . . considered both plans together and decided to do what it could to force people to retire," and "made the entire benefits package as undesirable as possi-

[2] Having sustained the judgment on ADEA grounds, the court of appeals did not reach the ERISA issue (App. A24 n.19).

ble for persons over age 65" (App. A18). The court concluded that "the discrimination against older employees from 1978 forward was carried out by the operation of both plans together" (*id.*).

The "integrated retirement package" rationale is based on undisputed facts. Changes to the "package" in 1978 made the *McMann* rule inapplicable. Petitioners' desire to have this Court reinterpret the same facts in a different manner does not present any issue that should be reviewed by this Court.

Moreover, when an employer acts after passage of the ADEA and revisits, reexamines, modifies, or consciously continues the discriminatory provision, an intent to evade the statute may be present. *See EEOC v. County of Orange*, 837 F.2d 420, 422 (9th Cir. 1988); *EEOC v. Home Insurance Co.*, 672 F.2d 252, 259 (2d Cir. 1982); *Smart v. Porter Paint Co.*, 630 F.2d 490, 495 (7th Cir. 1980); *Puckett*, 704 F. Supp. at 147-48. After extensive examination and consideration of the issue in light of the 1978 ADEA amendments and after recommendations were made to change the profit sharing plan to comply with ADEA, petitioners consciously decided to maintain the discriminatory plan provisions (App. A19). This makes *McMann* inapplicable.

IV. THERE IS NO CONFLICT WITH *THURSTON*

Petitioners' challenge to the finding of a willful violation of the ADEA (App. A19-A20) is based entirely on a reargument of the undisputed facts relied upon by the courts below. In continuing their "febrile arguments" (App. A24) on this point, petitioners omit the critical facts. Not only did petitioners receive legal advice that the profit sharing plan provisions were not authorized under ADEA (App. A19, C4) but, without waiting for the legal advice, issued a bulletin in 1978 announcing a new company policy that employees would be denied further profit sharing if they continued to work past age 65 (*id.*).

The court of appeals was correct in deciding that petitioners' attempt to secure legal advice "in a post hoc manner" did not negate the finding of willfulness, because it was "an attempt to obtain comfort for a course of conduct already decided upon" (App. A20). The court concluded that petitioners acted with "reckless disregard" of the ADEA, "not because the law was entirely clear, but because Farmers acted without bothering to find out what the law required" (*id.*). The decision below thus faithfully applies the *Thurston* standard, and presents no issue meriting consideration by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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